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IN THE

Supreme Court of the United States

October Term, 1966

No. 1019

MORRIS BERMAN,

Appellant,

-vs.-

JAMES M. POWER, THOMAS MALLEE, MAURICE J. O'ROURKE, JOHN R. CREWS, J. J. DUBERSTEIN, Constituting the Board of Elections of the City of New York, et al.,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS

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INDEX

	PAGE
Statement	1
The Pleadings	2
ARGUMENT.—The judgment appealed from rests on an adequate non-federal ground	5
CONCLUSION	7

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Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the appeal be dismissed on the ground that the judgment rests on an adequate non-federal basis.

Statement

This is an appeal from a final order of the Court of Appeals of the State of New York, dated October 18, 1966, affirming an order of the Appellate Division of the Supreme Court of the State of New York, First Department, entered June 30, 1966, which in turn affirmed (1) an order

of the Supreme Court of the State of New York granting appellees' motion to dismiss the complaint for legal insufficiency and (2) the judgment entered thereon.

Both the Court of Appeals, 18 N Y 2d 774, and the Appellate Division, 26 A D 2d 620, affirmed unanimously and without opinion. The only opinion in the action was that of the court of original jurisdiction, Supreme Court, New York County, 49 Misc 2d 713, reprinted as Appendix A to appellant's jurisdictional statement. That Court held that the complaint was legally insufficient on several non-constitutional and non-federal grounds. In referring to the constitutional ground now alleged by appellant the Court stated that "the instant action does not appear couched in terms proper to raise the question." 49 Misc 2d at p. 714. It added that, even if it were to consider that matter, it would not, as a court of original jurisdiction, assume the unconstitutionality of the law attacked (*id.*)

The Pleadings

This is a tort action for $400,000 damages allegedly caused by the "culpable negligence" (10-11)* and "malice" (12) of appellees, the Commissioners of the Board of Elections of the City of New York.

The complaint alleges that in 1964 plaintiff was a qualified voter, living in the then 41st Election District of the 4th Assembly District, New York County (8). A "church-controlled building," elsewhere described as a meeting hall owned by St. George's Ukrainian Catholic Church

* Numbers in parentheses refer to pages in the Record on Appeal in the Court of Appeals of the State of New York.

(15), was designated by defendants as the polling place for plaintiff's election district (9), as authorized by Section 66 of the Election Law (8). A crucifix was displayed in the meeting hall (9). Plaintiff admitted voting in the 1964 general election, but alleged that he took less time to vote than he normally did (10-11). He further alleged that he had intended to change his party designation when registering in October, 1964, but was unable to do so, thereby losing "personal connections [which] could have resulted in assistance in obtaining professional engineering work at a later date of substantial financial value * * *" (11-12).

Plaintiff also alleged that "as a result of the defendants' abuse of discretion and culpable negligence the plaintiff was deprived of his vote," although he did in fact vote in the 1964 general election; and that, because his religious obligation required him to cover his head in a religious building, he was compelled "to differentiate his religion publicly," although "he will find it difficult thereafter to determine to what extent such difference has militated against him" (10-11).

As already noted, plaintiff sought $100,000 damages for the "culpable negligence of the Defendants, and triple damages for malice on the part of said Defendants." The culpable negligence was based upon the defendants' "exercising their discretion in that they selected a church-controlled building" instead of one of the schools alleged to be in the neighborhood (9).

> "There was culpable negligence on the part of the Defendants in so selecting, as the question of the separation of church and state had come up before the Board on various occasions, and by devious means they had denied rights" (9-10).

There was also an allegation that defendants had subjected plaintiff "to influences of religious conversion" (10), and that a newspaper editorial, supplied with the complaint (15), "indicates such devious means used, constituting culpable negligence" (10). The complaint also contained the following paragraph:

> "6. That since the religion of the Plaintiff had not been officially revealed on the public records of the Defendants, the violation of the first amendment of the Constitution could have been inferred by the Defendants, which could not have assumed that all registrants and voters were of the faith of the church operating the polling place." (10)

There were no other allegations of culpable negligence, abuse of discretion or malice on defendants' part. Indeed, the word "malice" appears only in the demand for judgment, where it is used as the basis of a treble damage claim.

Along with his complaint, plaintiff submitted an affidavit (5-7) to which were attached a map (13), a copy of an unofficial registration sign that had been posted in his building (14), copies of newspaper clippings (15) and several photographs showing a crucifix, three signs and two scenes of election signs said to have been posted at public schools in the neighborhood (16).

Plaintiff's affidavit states that the 1964 polling place for his then election district was at 33 East 7th Street (3-4); that the building at that address was controlled by Saint George's Ukrainian Catholic Church, and that plaintiff, an orthodox Jew,

> "was not apprised of the church control of the premises * * * until October, 1964, though he may have voted from such premises before that date without having been apprised of such church occupancy. * * *" (4).

The affidavit also alleges that plaintiff unsuccessfully sought to be assigned to another polling place, but was told by the Board of Elections that a court order was necessary; that plaintiff sought "to inspect the polling place for religious symbolism" prior to the general election, but found the building closed, and that plaintiff discovered, on Election Day, 1964, a crucifix within the building plus two signs outside the building indicating occupancy by "groups under religious auspices" (apparently the Catholic War Veterans and the Boy Scouts, see Exhibit "E" [16]) (4-5).

The affidavit then states that a policeman and the Board of Election representative refused plaintiff's request to cover the crucifix and that plaintiff then voted, keeping his hat on. The affidavit asserts that "the choices he made on the voting machine were not his full, true, reasoned choices made after reasonable deliberation" (5-6).

ARGUMENT

The judgment appealed from rests on an adequate non-federal ground.

This is not an injunction proceeding, an action for declaratory judgment or a proceeding against a body or officer under Article 78 of the New York Civil Practice Law and Rules. It is a tort action alleging money damages

because of the administrative acts of the Board of Elections of the City of New York.

The opinion rests on four non-constitutional grounds: no allegation giving a basis for damages; inconsistency in the claim; no basis for the assertion of culpable negligence or malice; and statutory authority for defendants' acts. The court of original jurisdiction specifically says that "the instant action does not appear couched in terms proper to raise the [constitutional] question." 49 Misc 2d at 714.

It is a basic principle of this Court's procedure that appeal does not lie if the decision below rests upon an adequate non-federal ground. *Murdock* v. *City of Memphis,* 20 Wall. (87 U. S.) 590 (1874). The appeal must still fail because there are several non-federal grounds—insufficiencies in pleading—each of which is sufficient to sustain the judgment appealed from. *Fox Film Corp.* v. *Muller,* 296 U. S. 207 (1935). See STERN & GRESSMAN, *Supreme Court Practice,* Sec. 3-31 (3d Ed., 1962), pp. 105-106.

Moreover, this Court has declined to hear appeals from affirmances without opinion unless the appellant can show affirmatively that the non-federal ground is inadequate to support the judgment. *Lynch* v. *New York ex rel. Pierson,* 293 U. S. 52, 54-55 (1934). See STERN & GRESSMAN, *op. cit. supra,* Sec. 3-32 (c), p. 108.

No attempt has been made by appellant to amend the remittitur of the Court of Appeals of the State of New York to clarify the grounds of its decision. *Lynch* v. *New*

York ex rel. Pierson, supra, 293 U. S. at p. 55; *Herb* v. *Pitcairn,* 324 U. S. 117, 128 (1945). See STERN & GRESSMAN, *op. cit. supra,* Sec. 3-29, pp. 102-104.

Neither the "Statement as to Jurisdiction" of appellant nor the "Brief as to Jurisdiction" of the *amicus curiae* makes any reference to the non-federal grounds relied on by Special Term. Nor does either brief make reference to Special Term's explicit statement that "the instant action does not appear couched in terms proper to raise the [constitutional] question." 49 Misc 2d at p. 714.

CONCLUSION

The appeal to this Court from the judgment of the Court of Appeals of the State of New York should be dismissed.

February 24, 1967.

Respectfully submitted,

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